



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

DEC 22 2004

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Lyn Utrecht, Esq.
Ryan, Phillips, Utrecht & Mackinnon
1133 Connecticut Avenue, NW
Washington, DC 20036

RE: MUR 5440
The Media Fund

Dear Ms. Utrecht:

On April 7, 2004, the Federal Election Commission notified your client, The Media Fund, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your client at that time.

Upon further review of the allegations contained in the complaint, the Commission, on December 13, 2004, found that there is reason to believe that The Media Fund violated 2 U.S.C. §§ 441a and 434, provisions of the Act. The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information. Please note that respondents have an obligation to preserve all documents, records and materials relating to the Commission's investigation.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 30 days of receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

If you are interested in pursuing pre-probable cause conciliation, you should so request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter. Further, the Commission will not entertain requests for

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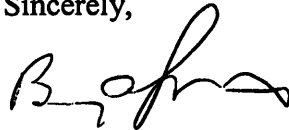
pre-probable cause conciliation after briefs on probable cause have been mailed to the respondent.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

If you have any questions, please contact Mark Goodin, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Bradley A. Smith
Chairman

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS

RESPONDENT: The Media Fund

MUR: 5440

I. INTRODUCTION

This matter was generated by a complaint filed with the Federal Election Commission (“the Commission”) by Bush-Cheney ’04, Inc. The complaint in MUR 5440 (the “Complaint”) alleges, among other things, that The Media Fund (“TMF”) has coordinated its activities with the DNC Services Corporation/Democratic National Committee and Andrew Tobias, as Treasurer (collectively, the “DNC”). Upon review of the allegations in the Complaint, the responses, and information on the public record, the Commission finds reason to believe that TMF violated 2 U.S.C. §§ 441a and 434 by making, and failing to report, excessive contributions, in the form of coordinated expenditures, to the DNC.

II. FACTUAL AND LEGAL ANALYSIS

A. FACTS

The Complaint alleges that TMF has coordinated with the DNC as a result of the activities of Harold Ickes. Harold Ickes, the founder and President of TMF, is a member of the DNC’s Executive Committee. The Complaint states that “[i]t defies credibility that the plans [Ickes] is now executing with soft dollars from the Media Fund were not discussed as a ‘need’ or a ‘project’ by the DNC’s executive committee during this election cycle, or that he is not ‘using’ information he learned from his DNC position as part of his soft money Section 527 political activities.” Complaint at 59. By virtue of his DNC position, Ickes allegedly knew that Kerry would need financial assistance after the primaries, knew in which broadcasting markets the

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assistance would be needed, and has used that knowledge in carrying out TMF's communications and activities.

B. ANALYSIS

The Complaint alleges that various respondents made expenditures for coordinated communications.¹ See 11 C.F.R. § 109.21. A communication is coordinated with a candidate, an authorized committee, a political party committee, or agent thereof if it meets a three-part test: (1) payment by a third party; (2) satisfaction of one of four "content" standards;² and (3) satisfaction of one of six "conduct" standards. 11 C.F.R. § 109.21. The conduct standards include:

- (1) communications made at the "request or suggestion" of the relevant candidate or committee;
- (2) communications made with the "material involvement" of the relevant candidate or committee;
- (3) communications made after "substantial discussion" with the relevant candidate or committee;
- (4) specific actions of a "common vendor";
- (5) specific actions of a "former employee"; and
- (6) specific actions relating to the dissemination of campaign material.

11 C.F.R. §§ 109.21(d)(1)-(6). The entity (candidate, authorized committee, or party committee) with whom or which a communication is coordinated does not accept an in-kind contribution that results from the "common vendor" or "former employee" conduct standards unless the entity, or

¹ The Complaint also generally alleges that certain respondents made coordinated expenditures for purposes other than communications. An expenditure that is coordinated with a candidate or party committee constitutes an in-kind contribution. See 2 U.S.C. § 441a(a)(7)(B); 11 C.F.R. § 109.20(a) and (b).

² In *Shays v. FEC*, 02-CV-1984, slip op. at 32-48, 156-57 (D.D.C. Sept. 18, 2004) (notice of appeal filed Sept. 28, 2004) the District Court invalidated the content standard of the coordinated communications regulation and remanded it to the Commission for further action consistent with the Court's opinion. In a subsequent ruling, the Court explained that the "deficient rules technically remain 'on the books,'" and did not enjoin enforcement of this (or any other) regulation pending promulgation of a new regulation. *Shays v. FEC*, 02-CV-1984, slip op. at 2 (D.D.C. Oct. 19, 2004).

an agent thereof, is ultimately found to have engaged in conduct described by conduct standards (1) through (3). 11 C.F.R. § 109.21(b)(2).

TMF argues that the Complaint does not state any violation by TMF of the Act or the Commission's regulations. TMF's response is based on the argument that Ickes was not an "agent" of the DNC. *See* TMF Resp. at 12-15. Section 109.3 provides that, for purposes of the coordination regulations, an "agent" is a "person who has actual authority, either express or implied, to engage in" certain activities related to the making of communications. 11 C.F.R. § 109.3. TMF argues that the DNC Executive Committee, of which Ickes and more than 60 others are members, "does not make decisions or recommendations on any specific communications made by the DNC." TMF Resp. at 12. TMF also contends that the DNC Executive Committee has not granted actual authority to Ickes "to act on behalf of the DNC for any reason, including with respect to his independent role at TMF." *Id.*

A finding that TMF engaged in coordinated communications depends, at this stage, on an analysis of its activities under the "conduct" prong of the coordinated communication test, the "payment" and "content" prongs having been met.³ Here, an investigation of whether TMF engaged in coordinated communications for the benefit of the DNC may be based on the "material involvement" conduct standard. The "material involvement" standard is satisfied if:

A candidate, an authorized committee, a political party committee, or an agent of any of the foregoing, is materially involved in decisions regarding:

³ The first prong of the coordinated communication test is satisfied because TMF—the entity that paid for the communications at issue—is a "person other than [the] candidate, authorized committee, political party committee, or agent of any of the foregoing." 11 C.F.R. § 109.21(a)(1). TMF meets the second prong (the "content" standard) of this test because it aired advertisements that qualify as "public communications" under Section 109.21(c)(4). The scripts of purported TMF ads make the following statements: (1) "George Bush's priorities are eroding the American dream. It's time to take our country back from corporate greed and make America work for every American"; (2) "George W. Bush is taking our country in the wrong direction. It's time to make America work for every American"; and (3) "When it comes to choosing between corporate values and family values, face it, George Bush is not on our side." These advertisements meet the candidate identification requirement of Section 109.21(c)(4)(i), and appear to meet the timing and targeting requirements of Sections 109.21(c)(4)(ii) and (iii).

- (i) The content of the communication;
- (ii) The intended audience for the communication;
- (iii) The means or mode of the communication;
- (iv) The specific media outlet used for the communication;
- (v) The timing or frequency of the communication; or
- (vi) The size or prominence of a printed communication, or duration of a communication by means of broadcast, cable or satellite.

11 C.F.R. § 109.21(d)(2).

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Any potential coordinated communication by TMF for the benefit of the DNC is not dependent on a determination that Ickes is an “agent” of the DNC. Reading the “material involvement” prong to require the existence of an agency relationship between Ickes and the DNC—as the DNC argues—would lead to an absurd reading of the coordination regulation as a whole. It would mean that absent evidence that the DNC had authorized Ickes to act as its agent, there could be no finding of coordination against TMF, even if Ickes may have used material information he obtained from the DNC in the creation, production, or distribution of TMF’s ads. On the other hand, if Ickes had resigned his position with the DNC some time before TMF ran ads meeting the content standard then, under the “former employee” conduct standard, one could establish coordination merely by showing that Ickes had used information about the DNC’s plans, projects, or needs in connection with TMF’s ads. In other words, such a reading would make it *more difficult* to establish coordination based on circumstances where Ickes simultaneously held leadership positions at the DNC and TMF than it would be if Ickes had resigned his position with the DNC.

Such a conclusion defies common sense and is inconsistent with the Commission’s explanation of the “material involvement” prong of the regulation. The Commission described the “material involvement” standard as “necessary to address forms of ‘real world’ coordination that would not be addressed in any of the other conduct standards,” noting that the operation of

this standard is “necessarily fact-based.” Explanation & Justification, “Coordinated and Independent Expenditures,” 68 Fed. R. 421, 433 (Jan. 3, 2003) (“E&J”). The potential use of inside information by a person who has leadership positions in both a spending organization and a recipient committee is a type of “real world” coordination not directly addressed by any of the other conduct standards.

Moreover, the Commission also explained that, in order to be “materially involved” in decisions enumerated in Section 109.21(d)(2), the “representatives of [a] political party committee need not be present or included during [the] formal decisionmaking process but need only participate to the extent that he or she assists the ultimate decisionmaker, much like a lawyer who provides legal advice to a client is materially involved in a client’s decision even when the client ultimately makes the decision.” *Id.* at 434. It is also notable that the “material involvement” standard describes conduct—in the disjunctive—by “[a] candidate, an authorized committee, a political party committee, or an agent of any of the foregoing.” *Id.* Accordingly, apart from the activity through an authorized agent, a “political party committee” may be materially involved in the activity by furnishing a decisionmaker for the spending organization with access to party information that is material to the spending organization’s advertising.⁴ In the present matter, we believe that the DNC satisfied the “material involvement” standard because of the conduct of one of its Executive Committee members—Ickes.

Ickes simultaneously held leadership positions in both the DNC and TMF. According to the Charter of Democratic Party of the United States (as amended Jan. 19, 2002), the Executive

⁴ In its explanation of these rules, the Commission has repeated the disjunctive formulation of the persons at issue under the “material involvement” standard. “[A] candidate, authorized committee, or political party committee is considered ‘materially involved’ in the decisions enumerated in paragraph (d)(2) after sharing information about plans, projects, activities, or needs with the person making the communication, but only if this information is found to be material to any of the above-enumerated decisions related to the communication.” E&J at 434.

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Committee of the DNC “shall be responsible for the conduct of the affairs of the Democratic Party....” This role of the Executive Committee provides a basis to infer that Ickes—as a member of the Executive Committee—had access to inside information and people who possessed such information. In other words, Ickes was in a position with the DNC where he would likely have had access to material information about the DNC’s plans, projects, or needs, and was in a position with TMF to use that information to make decisions in connection with TMF communications. During the relevant period, both TMF and the DNC shared the goal of electing the Democratic nominee for President, and both engaged in extensive ad campaigns. By focusing entirely on whether the DNC had authorized Ickes to act as its agent, TMF fails to refute a reasonable inference from these circumstances that Ickes had access to material information about the plans and needs of the DNC, and that he used such information in determining the content, means, intended audience, specific media outlet, timing, and other factors for communications made by TMF.

These circumstances at least warrant an investigation. Complainants will rarely, if ever, be aware of anything more than circumstances facilitating coordination. We cannot know what information Ickes may have had (and may have used) without an investigation.

In addition to the “material involvement” conduct standard, the facts present a basis to investigate whether the “request or suggestion” or “substantial discussion” elements might also be satisfied. *See* 11 C.F.R. § 109.21(d)(1) and (3). The “substantial discussion” conduct prong (Section 109.21 (d)(3)) covers communications produced “after one or more substantial discussions about the communication between the person paying for the communication [or that person’s employees or agents]” and any from a list of persons including a political party committee or its agents. 11 C.F.R. § 109.21(d)(3). “A discussion is substantial within the

meaning of this paragraph if information about the [party committee's] campaign plans, projects, activities or needs is conveyed to a person paying for the communication, and that information is material to the creation, production, or distribution of the communication....” *Id.* As described in our analysis of the “material involvement” standard, Ickes’s leadership positions in both TMF and the DNC creates an inference about his access to information at the DNC concerning that party committee’s “plans, projects, activities, or needs.” TMF’s response does not foreclose the basis for investigating whether any such discussions took place.

Even if an analysis of TMF’s potential coordination with the DNC depended on a finding that Ickes was an “agent” of the DNC, there is sufficient information to investigate whether he acted in that role. The available facts raise a question as to whether Ickes in fact acted as an agent of the DNC when he formed, and directed the activities of, TMF.

III. CONCLUSION

The Commission finds reason to believe that The Media Fund violated 2 U.S.C. §§ 441a and 434 by making, and failing to report, excessive contributions, in the form of coordinated expenditures, to the DNC Services Corporation/Democratic National Committee and Andrew Tobias, as Treasurer.